

ATTORNEY REGULATION ADVISORY COMMITTEE

MINUTES

Wednesday, March 1, 2017
9:30 a.m. – 11:30 a.m.

State Courts Building, 1501 West Washington Street, Phoenix, Arizona
Conference Room 109

Present

Hon. Lawrence Winthrop
Hon. William J. O'Neil
Whitney Cunningham
Elaine Sweet
Edward Novak
Lisa Panahi
George Riemer
Patricia Sallen
David Lunn
Scott Rhodes
Justice Ann Timmer

Telephonically Present

Ben Click
Emily Johnston

Absent

Ronald R. Watson
Pamela Treadwill-Rubin
Maret Vessella

Staff

Kathleen Curry
Mark Wilson
Brianna Farmer
Marisa McNally

Regular Business

9:32 a.m. Call to Order and Introduction

Hon. Lawrence F. Winthrop

Business Items and Potential Action Items

No. 1 Review and Approve December 2016 ARC minutes

Motion: Approve December minutes with edits from Kathleen Curry and George Riemer.

Moved by: Hon. William J. O'Neil

Second: Edward Novak

Carried: None opposed.

No. 2 Review, Discussion and Possible Action from Supreme Court's Rules Forum

- *R-16-0042 Online JD exam eligibility*

David Lunn /Work Group

David Lunn presented to the committee a report the work group prepared regarding R-16-0042. The work group's charge was to gather information on Concord Law School's R-16-0042 petition. The work group spoke with the deans of the Arizona law schools, as well as reviewed other jurisdictions that allow online law schools graduates to sit for the bar exam. The work group did extensive research regarding admission requirements in California and on the Concord Law School as far as pass rates, studies, and Concord Law School's admission requirements. The work group also spoke with Justice Berch about ABA accreditation requirements. The work group reached the conclusion that there does not seem to be a reason, at this moment, to allow non-accredited law school graduates to sit for the bar exam. The work group noted there is currently a rule that allows non-accredited law school graduates to sit for the bar exam after being a practicing lawyer for three to five years. This rule would apply to Concord graduates. David Lunn talked to the admissions department in Oregon. Oregon has the same rule that allows a non- ABA law school graduate to sit for the exam after practicing three years.

Judge Winthrop observed that the data that was provided by Concord was selective or insufficient to make a recommendation on moving forward. David Lunn explains that Concord Law School picked the years that it had the most success on the bar exam. Concord does not require students to take the LSAT for admission but must take an exam that is equivalent. Also, about a year and half into the program, students have to take a mini bar exam. In order to continue the program students have to pass that mini bar exam. Last year only about 17 people took the mini bar exam, and of that group the pass rate was similar to California's bar exam pass rate. Before then, Concord's pass rate came to about 24%.

Patricia Sallen mentioned that Concord Law School does not provide information about its efforts to obtain accreditation to deal with this issue through the ABA. The former dean of the school is a part of ABA staff, who is involved in accreditation and licensing. The work group questioned if Concord wants to change the accreditation, standards, and allow its graduates to take the bar exam, why hasn't any other efforts been made.

Motion: Approve and file proposed comment provided in the report.

Moved by: J. Scott Rhodes

Second: Whitney Cunningham

Carried: None opposed.

- *R-16-0045 Rule 42, ER 6.4*

Mark Wilson

Mark Wilson provided a report regarding R-16-0045. This petition was filed in response to the factual situation surrounding a prior rule petition and a perceived conflict of interest certain lawyers had concerning that prior rule petition. In the earlier petition, the petitioner seeing no disclosure of a perceived conflict of interest, filed a complaint to the State Bar. It appears that the charge was dismissed. As a result of the

dismissal, the petitioner proposed a rule change to ER 6.4, for the purpose of causing attorneys speaking for themselves to disclose if the proposed topic will benefit the lawyer. Mark recommends the committee not submit a comment regarding this rule petition.

J. Scotts Rhodes further explained that Rule 6.4 is a rather obscure rule. ER 6.4 walks a line between a lawyer's professional responsibility and a lawyer's first amendment rights. As citizens, lawyers are permitted to serve in these organizations that try and change the law. Rule 6.4 requires when advocating for a change the lawyer must disclose whether the change will benefit an existing client. The proposed change would require the lawyer to disclose if the lawyer would personally benefit from the change. Rhodes believes that if the rule changed, the courts will have to consider to what extent the language of the revised rule would conflict with a lawyer's first amendment rights.

- *R-16-0047 Rule 38 Approved Legal Service Organizations* Patricia Sallen

Patricia Sallen provided a report regarding R-16-0047. This petition addresses the steps a registered in-house counsel must take to provide legal advice on a pro bono basis under the authority and supervision of a pre-approved legal services organization. Patricia Sallen provided the history concerning the ability of registered in-house counsel and non-Arizona admitted lawyers to provide legal services through a pre-approved organization. Presently both the registered in-house counsel and a non-Arizona admitted lawyer must follow the same certification/registration processes. The proposal petition would allow registered in-house counsel to rely on their in-house counsel registration process to authorize them to provide the pro-bono services.

Hon. Lawrence Winthrop mentions that the legal organization service providers referenced are the legal aid agencies located in Arizona. Due to budget issues and lack of resources, these organizations have volunteer lawyer programs. One way these programs are trying to expand their volunteer program is to recruit retired out-of-state lawyers as well as in-house counsel. For those who are not licensed in Arizona, they are able to obtain approval to practice through the registration process. The current Supreme Court rule requires these lawyers to go through a second registration process in order to volunteer pro bono services. This has understandably diminished the interest of these lawyers in volunteering. This petition was filed on behalf of Legal Aid Services.

Hon. William J. O'Neil asked if the registration process to become an in-house counsel was significantly different or asked significantly different information than that asked to register to provide the pro-bono services. Patricia Sallen said the processes were substantially similar.

Scott Rhodes noted that this petition would allow a registered in-house counsel to represent more than one client and as to the pro-bono cases to appear in court. Justice Ann Timmer mentioned that this petition will remove the barrier of having to register for multiple certifications if the lawyer is wanting to volunteer in multiple legal service organizations. Currently the rule has the lawyer re-applying for each supervising legal aid provider.

Motion: File comment in support of this petition.

Moved by: The Honorable William J. O'Neil

Second: J. Scott Rhodes

Carried: None opposed.

- *R-17-0005 Rule 50 ADPCC membership*

Mark Wilson

Mark Wilson provided a report the committee regarding R-17-0005. The Probable Cause Committee is made up of six lawyers and three public members. The committee initially started in 2011 and the terms are staggered. Rule 50(B), allows each member to only serve two full terms (three years each). Staff has recognized that this committee is being treated differently than other committees. Other committees have no term limits and reappointment is left to the discretion of the Supreme Court to determine the best person to be appointed for a given seat at any given time. Staff believed it would be a good idea to cause this rule to be consistent with the rules for the other boards. Hon. Lawrence Winthrop, who is the chair of the committee mentions that he is in support of the petition but can understand why others would have a different view.

J. Scott Rhodes stated that he represents respondents in State Bar matters. He opposes this petition because he does not see there is a problem or challenge to find individuals who would want to sit on the committee. He fears that if the Court does not stay fluid with committee member appointments that the system will revert back into what it used to be criticized for as being an overly closed system without sufficient public involvement. He believes that if there are always the same members of the public on the committee, then we are not inviting the public eye into the system. From a regulatory point of view, he believes that it is necessary to always bring in new people and new perspectives. ADPCC in particular has one element that is not present in other committees such as character fitness. The complainant and respondent are able to submit written documents for the committee to consider, yet the only people who appear during the meetings are the state bar counsel. He believes that though it may not be intentional, the committee members and state bar counsel can form a relationship over the years. If new members are not regularly introduced, there is a chance that the committee will become static, and this would raise some of the same criticisms leveled at the prior discipline system. He believes that having turn over will be healthier for the system and is worried that this rule petition does not advance the goals of the revamped discipline system, but rather is only expedient for staff and committee.

Elaine Sweet mentions that when she first read the petition, that she thought the same exact thing J. Scott Rhoades mentions. She explains how she has had a lot of experience on several different committees within the courts. The ACJA actually has a rule that requires members help recruit public members. She believes that it can be necessary to open the doors to have new perspectives.

Hon. Lawrence Winthrop mentions that ADPCC meets every month and the docket at times significant. The ADPCC has had turn over where people have either retired or stepped away. The committee has replaced one public member and numerous attorney members. One of the concerns is that the committee has attorney members who are exceptionally experienced and have that institutional knowledge. It just happened that numerous members on the committee terms have ended, which is one of the main reasons to why this petition was filed.

Hon. William J. O’Neil mentions that his discipline panels have been criticized for having too many members and that there was not enough experience. So criticism can come from both ends. He agrees with Hon. Lawrence Winthrop in the sense that when you have an attorney member who has experience in the field that it can be quite helpful.

Mark Wilson mentions from staff’s perspective, that when this idea was raised, it wasn’t because of the difficulty of finding new members, but more based upon the expertise and experience of the members. Within the Certification and Licensing Division, staff looks for members who will be able to challenge staff when staff presents to a board. When the State Bar or CLD staff approach the board, it helps if the members have expertise to challenges us, or the board will simply be a “rubber stamp.” Hon. Lawrence Winthrop mentions in the draft annual report, one of the statistics that is reflected is to note the number of times that ADPCC disagrees with State Bar.

Justice Ann Timmer commented that perhaps the rule should be amended to add one more term of three consecutive years instead of an unlimited number of terms. She sees that this may accommodate both issues. She understand the importance of new appointments and that people could be disinclined to apply if they think that the incumbent is going to receive the appointment. Justice Ann Timmer suggests another compromise perhaps would be a presumptive two term, unless the Court believes that there is a pressing need for additional terms.

Whitney Cunningham agrees with J. Scott Rhodes on this issue. At the State Bar when there would be a divided board on some of these rule petitions, the solution was to perhaps not take a position but to send up their best arguments from both sides, hoping that it would be best for the courts. He suggests that if that’s an option the committee can do, to send up pointers from both sides and include some of Justice Timmer’s suggested compromises.

Motion: File a comment discussing the pros and cons of the petition and the various options discussed by the committee.

Moved by: Hon. William J. O’Neil

Second: Whitney Cunningham

Motion Withdrawn

Motion: File a comment that the ARC opposes the proposed rule change as written, and recommends a modification of it that leaves the two term limit in place and includes a statement clarifying that in exigent circumstances, the court has discretion to modify term limits if needed.

Moved by: J. Scott Rhodes

Second: Elaine Sweet

Carried: None opposed.

- *R-17-0008 Rule 39 Pro Hac Vice Admission*

Lisa Panahi

Lisa Panahi provided a report regarding R-17-0008. This petition would allow the State Bar resource center to accept Pro Hac Vice applications electronically.

Motion: Offer a short comment in support in the rule change.

Moved by: Scott J. Rhodes

Second: Patricia Sallen

Carried: None opposed.

Lisa Panahi Recused

- *R-17-0011 Rule 38 In-House Counsel Registration*

Lisa Panahi

Lisa Panahi provided a report regarding R-17-0011. In the first section, the State Bar proposed some corrections to Rule 38 that were oversights. In the second section, the State Bar is proposing to clarify the amount an attorney practicing pending admission must pay into the client protection fund. The third proposal is to clarify that in-house counsel registration applies to one employer. The last section proposes to amend the language to the comment for Rule 38. Rule 38 only has one comment which it applies to in-house counsel, the amendment would modernize the rule and to clarify as to whether the registered in-house counsel must have a physical office in Arizona.

Motion: Offer a short comment in support of the petition and include a brief recommendation that the capitalized word “state” in the comment be changed in an appropriate way to be clear that it is referring to Arizona.

Moved by: Scott J. Rhodes

Second: Patricia Sallen

Carried: None opposed

- *R-17-0022 Rule 32 Bar membership*

Mark Wilson

Mark provided a report regarding R-17-0022. The petition requests that the State Bar’s functions be separated between mandatory and voluntary functions. Mandatory membership functions would deal with discipline and client protection fund. All lawyers would need to pay the mandatory dues. The voluntary membership functions would deal with other activities of the bar. Dues associated with the voluntary functions would be voluntary. Pursuant to the language of this petition, the State Bar would collect all dues and conduct an independent audit once a year of mandatory functions and costs. There was also discussion of HB 2295 and the similarities and differences. HB 2295 would allow the State Bar to continue to perform its current functions but Bar dues flow through to the Supreme Court, and the Court insures the dues are used for mandatory functions. On the voluntary side, the Bar would have the ability to charge what dues it deems fit for the services it decides to perform. HB 2295 is currently in the Senate and assigned to Judiciary and Rules in the Senate. The Committee had extensive discussion concerning the value of a mandatory bar and the appropriateness of providing comments at this time.

Motion: File a comment opposing the petition
Moved by: Whitney Cunningham
Second: Ed Novak
Motion withdrawn after discussion

Motion: Committee should solicit information the nature, extent and purpose of current Rules and proposed petition.
Moved by: Whitney Cunningham
Second: Elaine Sweet
Motion withdrawn after discussion.

Motion: To have this Committee wait for direct from the Supreme Court regarding this petition.
Moved by: George Riemer
Second: Scott J. Rhodes
Carried: None opposed.

No. 3 Review and Discussion on Pending Legislation Mark Wilson
a. HB 2295
b. HB 2300
Discussed with R-17-0022.

No. 4 ARC Annual Report Assignments and Deadlines Justice Timmer

Judge Winthrop discusses the ARC Report and the template that has been created over the last couple of years. Justice Timmer mentions the only thing missing from the ARC Report data are the potential issues for ARC in 2017. She asks that if any suggestions are present to email her with them. April 1st is when suggestions are due in order to give adequate time to review and approve at the next meeting.

No. 5 Admissions Statistics Update Mark Wilson

Mark discusses the chart provided to the Committee regarding first time testers only. The Committee would also like to see this information broken down by law school.

No. 6 Supreme Court Task Force Update: George Riemer
Ethics and Professionalism and the Unauthorized Practice of Law Mark Wilson

George Riemer updates the Committee that a report will be available in the next few months. The task force discussed combining the UPL Committee and the Ethics Committee into one appointed by the Supreme Court to issues opinions.

No. 7 Call to Public

Next meeting date: Wednesday, April 12, 2017

Any agenda item, including the call to the public, may be considered at a time other than what is indicated on this agenda.

The Committee may meet in executive session as permitted by A.C.J.A. §1-202.

DRAFT